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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 289.

HARRY S. CONNELLY AND MARION E. CONNELLY, W. A. GRANT AND ELAINE GRANT, a co-partnership doing business as HARBAR DRILLING CO., *Petitioners*

v.

IRENE ETHEL JENNINGS, *Respondent.*

On Amended Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF FOR IRENE ETHEL JENNINGS IN OPPOSITION

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March, 1953.

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OPINIONS BELOW

The District Court of Oklahoma County rendered no opinion.

The opinion of the Supreme Court of the State of Oklahoma (R. 35-44) is reported at 23 Okla. State Bar Journal 235.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on February 12, 1952 (R. 35). A petition for rehearing filed on March 3, 1952 (R. 44) was denied on March 25, 1952 (R. 46). Application for leave to file a second petition for rehearing filed on March 29, 1952 (R. 46) was denied on December 16, 1952 (R. 51). The jurisdiction of this Court is sought to be invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED[1]

Petitioners' question numbered 1 (Amended Pet., p. 2) —whether Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949, which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable," is applicable to a case in the process of being tried, or is it only applicable to matters arising prior to trial— goes beyond the scope of the matters in issue in this case and was not properly put in issue before the Court below. See infra, pp. 21-23.

This question can be more pertinently phrased as follows:

1. Did the May 24, 1949 Amendment to Section 1446, Title 28, U.S.C. (C. 139, 63 Stat. 101) (See Appendix, infra, pp. 32-33) allowing defendants to remove a cause within twenty days after it may first be ascertained that the case has become removable, introduce a substantial change in the then existing laws on removal or was this

[1] Petitioners have served notice that if certiorari is granted, they also intend to argue that the trial court erred in denying petitioners' motion, once grounds for removal appeared, to stay the proceedings in the trial court for a reasonable time within which they could file a petition for removal in the appropriate Federal Court (Amended Pet., p. 2, f.-note 1) The record clearly shows that grounds for removal never appeared and that the trial court acted in accordance with law.

provision declaratory of the then existing rule laid down by the decisions?

Petitioners' question numbered 2 (Amended Pet., p. 3) —after a proper petition for removal has been timely filed with the appropriate federal court, may a state court proceed further with the case when it has not received a certified copy of the order of removal from the clerk of the federal court, as provided by Sections 1446 (e) and 1447 (c) of Title 28, U.S.C.?—was not properly put in issue before the court below or in this Court and, if it had, could be couched in more relevant terms as follows:

2. May an unsuccessful defendant in a state court who has petitioned a federal district court for removal, arguing that his cause did for the first time become removable during the course of the trial, and who then has voluntarily dismissed his petition for removal, four days after this voluntary dismissal argue his own motion for a new trial in the state trial court and present no objection to said proceeding in the trial court and not call attention to the trial court of the existence of the dismissal, and upon losing out in the trial court, later bring an appeal and after that a petition for rehearing to the Supreme Court of the State and not mention the fact of the absence of a certified copy of the order of remand in the trial court until he files an Application for Leave to File Second Petition for Rehearing, which he is denied and then complain successfully to this Court because the trial court proceeded further upon his own motion?

STATUTE INVOLVED

The pertinent statutory provisions are printed in the Appendix, infra, at pp. 32-35.

STATEMENT

A. Facts

The facts in this case are well brought out in the opinion of the Supreme Court of the State of Oklahoma (R. 35-44). Briefly, they are as follows:

Respondent's husband, Alfred Jennings, now deceased, was employed by petitioners on a drilling rig in Garvin County, Oklahoma. He went to work on his tour about three o'clock in the afternoon of July 25, 1948. About six o'clock he came down from the swivel board to the derrick floor, which was about seventy feet below. He assisted other members of his crew with a piece of machinery, then took a drink of water and talked briefly with another member of the crew. He was seen walking toward a nine-step stairway leading off the derrick floor to the ground. This stairway was used by Jennings to get to the shale-shaker where he performed certain of his duties. Approximately five minutes after he was seen walking toward this stairway he was found by a fellow-employee lying upon the ground east of the stairway face down, with blood running from his nose and mouth, and there was a scuffed place on his forehead. He died on the way to the hospital a short time after he was found.

The Supreme Court of Oklahoma specifically found: "The stairway in this case was constructed in such a way as to invite use, but was entirely too steep for ordinary use, and was built in such a way as not to reveal its imperfections without inspection. It was such an instrumentality that the employee could rely upon the employer to make it safe." (R. 37).

The same Court further found: "We are definitely of the opinion that this stairway, at the bottom of which the deceased was found, was defective. The top step was narrow and the riser did not conform to the others; there was only one hand rail, and the stairs were too steep. The steps by their construction invited the user to walk facing the stairway in ascending and with his back to it descending, but were so defective that it was easy for anyone to lose his footing or become overbalanced and tumble headlong down the stairs." (R. 38).

B. Sequence of Pertinent Proceedings

An understanding of the pertinent proceedings from the trial court to the Supreme Court of Oklahoma is imperative in this case and because the complete and proper order of these proceedings with their significant dates is not given in petitioners' statement, the correct sequence of these proceedings will be given at this point.

The case was filed by the petitioners in the District Court of the State of Oklahoma, November 8, 1948. (R. 10) On November 22, 1948, the petitioners filed petition for removal from the State Court to the United States District Court of Oklahoma, alleging that the action against petitioners and defendant, Charlie Prather, was separable and that Charlie Prather was named in the petition "for the sole purpose of attempting to deprive the Federal Court of jurisdiction, and to prevent the removal of this cause to the Federal Court." (R. 13-14) The Federal Court after joinder of issues found squarely against petitioners and remanded the case back to the State Court for trial. (R. 15).

The District Court of Oklahoma County, State of Oklahoma, rendered a verdict and judgment in favor of respondent for the sole and exclusive use and benefit of herself as the surviving spouse and for the benefit of Jessie Jennings, age eight, Donald Jennings, age six, Howard Jennings, age four, and Dwuane Jennings, age two, the surviving minor children of Alfred Jennings, deceased (R. 32, 10), on June 21, 1949, and petitioners filed their motion for a new trial on June 24, 1949 (R. 29). On June 27, 1949, within six days after trial and within three days after petitioners filed their motion for a new trial, and while this motion was pending, petitioners filed in the United States District Court for the Western District of Oklahoma, a petition for removal (R. 6), purporting to base this petition upon 28 U.S.C., Sec. 1446, as amended on May 24, 1949. (See Appendix, infra, p. 32). Petitioners filed in the State Court on June 27, 1949, the certificate of

the clerk of the United States District Court for the Western District of Oklahoma showing receipt of the petition for removal (R. 6).

In that petition for removal petitioners argued that respondent had voluntarily discontinued her action against the resident defendant and had voluntarily failed to file a motion for a new trial as against the resident defendant, Prather, during the trial held on June 20 and 21, 1949 (R. 8). For a refutation of this argument, see infra, pp. 7-12. Petitioners argued further for removal to the Federal District Court, as follows:

> "Whereupon said cause did for the first time become removable and in compliance therewith your petitioners have caused this petition to be filed." (R. 8, 9).

For a reason known only to petitioners, they voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34). The United States District Court for the Western District of Oklahoma granted petitioners' request and ordered the cause dismissed without prejudice and at the costs of petitioners on July 22, 1949 (R. 34).

In that petition for removal, petitioners had the opportunity to make a timely presentation of the question whether Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949, which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable," was applicable to the facts and circumstances of petitioners' case at that time. That is the substance and the relevant scope of the first question presented by petitioners in their amended petition for certiorari (Amended Pet., 2). Petitioners did raise this question (R. 8, 9) and then voluntarily moved that their petition be dismissed without prejudice (R. 34)

Petitioners in that petition for removal argued that their cause did for the first time become removable on June 20

and 21, 1949 (R. 8, 9). They then voluntarily dismissed their petition for removal and to the present day they have not filed a new petition for removal. Certainly, they did not file such petition within 20 days, as provided by Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949. See Appendix, infra, p. 33.

On July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County, State of Oklahoma, which motion was overruled (R. 31).

C. Correction of Errors in Petitioners' Statement

In petitioners' statement we find the following erroneous remarks:

> "At the trial respondent abandoned the alleged acts of negligence against Prather and confined her evidence to the condition of the stairway. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them." (Amended Pet., 4).

In the petition upon which this case was tried in the trial court, the following language is found:

> "That on the 25th day of July, 1948, Alfred Jennings, deceased, was working for and employed by the defendant co-partnership, under the supervision of the defendant, Charlie Prather, field agent for said co-partnership and at all times hereinabove and hereinafter set out was acting as the servant, agent and employee of the said co-partnership." (R. 10-11).

In all the allegations of negligence found in said petition, respondent alleged that the defendants in the trial court, including petitioners and Charlie Prather, were guilty of negligence in maintaining an unsafe place for deceased to work and in failing to provide proper hand rails, failing to build a proper stairway, and other acts of negligence. (R. 10-12).

In petitioners' response in the trial court, petitioner admitted "that part of the allegations contained in paragraph '2' [of respondent's petition in the trial court] relating to the employment of Alfred Jennings, and the supervisory capacity of Charles Prather." (R. 20-21).

For the refutation of petitioners' erroneous statement, referred to supra, respondent must draw the attention of this court to the following stipulation of the attorneys for petitioners and respondent:

> "It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed. John Butler, Peyton Ford, Counsel for Petitioner; C. W. Schwoerke, Counsel for Respondent." (R. 53).

In the opening statement, made to the jury by the respondent on page 70 of the case-made (R. Unprinted), we find this statement:

> "When we prove that state of facts, Gentlemen of the Jury, and you hear the testimony of liability and damages and, the Superintendent, the General Superintendent, Mr. Prather, was upon this floor and saw the condition existing and did not correct or order it corrected * * *."

Respondent then put on the driller in charge of the well and drilling rig of petitioners at the time of the death of the said Alfred Jennings, one Joe Kirkpatrick, and on page 101 of the case-made (R. Unprinted) this evidence was deduced from this witness:

> Q. "Was anyone over you in authority?
> A. Yes, sir.
> Q. Name the first man over you?
> A. You mean, the top man?
> Q. No. Who was he. What do you call him? Was he a driller, or something else? The first man over you?

A. Tool pusher.

Q. How many tool pushers?

A. There were two tool pushers and the drilling superintendent.

Q. Now, was there a drilling superintendent?

A. Yes, sir.

Q. What was he in charge of?

A. Everything.

Q. He was the man in charge of everything?

A. Yes, sir.

Q. Was he your superior officer?

A. He was, he came around and gave me orders.

Q. Who was your drilling superintendent?

A. Mr. Prather.

Q. Did he, or not, come to this rig during the time you were drilling before Alfred was killed?

A. Yes, sir; he had been out there.

Q. Had he been where he could see that condition?

A. He had been on the derrick floor.

Q. He had been, you say, on the derrick floor?

A. Yes, sir.

Q. At the time Mr. Prather, the Superintendent, was on the derrick floor, tell the jury, how many hand rails there were on that stairway?

A. There was one.

Q. Tell the jury whether or not the stairway was put in, as it is there, here on the floor, when he was there?

A. Yes, sir. * * *

Q. When Mr. Prather was there, were you and your crew using that stairway?

A. Yes, sir."

Andrew Cummings, another witness called by the respondent, testified, on page 132 of the case-made (R. Unprinted), as follows:

Q. "Do you know Mr. Prather, General Superintendent?

A. Yes, sir.

Q. I will ask you to state whether or not Mr. Prather, general superintendent, was at this derrick, and on the derrick floor, or about the derrick floor, before the date of this death? Was he or not?

A. He was out there sometime when we were rigging up.

Q. Did you ever receive any directions, or direct orders, as a member of the crew, from Mr. Prather?

A. Well, I will answer that this way. Someone called up—calls up some little something to do and he might have me do it. Like—get a chain, but, as far as any big job, I think they give that to the driller and the driller has the rough neck—tells the rough neck what to do.

Q. Did you ever hear any orders given to put another hand rail on that stairway or not?

A. No, sir; if they had told me to put another hand rail on there we would have done so."

Another witness, W. W. Hayes, was put on the stand by the respondent and on pages 139 and 140 of the case-made (R. Unprinted) we find this testimony:

Q. "Do you know Mr. Prather?

A. Yes, sir.

Q. Who is he? That is, how is he connected with the Company?

A. Drilling superintendent.

Q. Was he drilling superintendent at the time Alfred Jennings was killed?

A. Yes, sir.

Q. I will ask you to state whether or not he had been such drilling superintendent for some time?

A. Yes, sir.

Q. Tell the jury whether or not Mr. Prather, the general superintendent, had been at this location while the stairway was in this position as shown on this model?

A. Yes, sir.

Q. Do you know whether or not he used the stairway in going up on top of the derrick floor?

A. I could not say that * * *."

And on page 148 (R. Unprinted) we find this testimony:

Q. "Was there any hand rail on the left side of that stairway going down, at the time Mr. Prather, the General Superintendent was out there? * * *

A. Well, at the time before there was not no hand rail on it.

Q. Tell the jury here, whether or not Mr. Prather, the General Superintendent, was out there at any time when Alfred Jennings was working on the job on that derrick?

A. Yes, sir."

See, also, Demurrer to Evidence and Ruling thereon (R. 26).

This evidence is set out here to show this Court that the respondent, plaintiff in the lower court, in putting Mr. Prather in this lawsuit as a defendant, had good, sincere, and honest reasons to contemplate and consider that he was a proper party defendant.

The evidence at the trial disclosed that the non-resident defendants in the trial court, Harry S. Connelly and Marion E. Connelly, W. A. Grant and Elaine Grant, constituted a co-partnership, having their place of residence and office in Wichita, Kansas. That the defendant, Charles Prather, was their top man in Oklahoma; had charge of all their drilling operations and was Field Superintendent in Oklahoma. This evidence is undisputed.

Therefore, it was a serious and sincere claim that was made by petitioner in the trial court that if the negligence alleged as causing the death of Alfred Jennings, roughneck on one of the defendant's drilling rigs, maintained, operated and under the final jurisdiction and control of Prather, was actionable, such negligence should carry over to the defendant, Prather. Certainly, such joinder was not fraudulent and the trial court properly overruled petitioners' motion for continuance to remove their case to a Federal Court based upon the theory of a fraudulent joinder. (R. 5; Amended Pet. 4).

Petitioners' Statement contains the following language:

"While respondent took exception to the court's order sustaining Prather's demurrer, she filed no

motion for new trial as required by the laws of Oklahoma, so that judgment became final insofar as it related to Prather."

Respondent respectfully submits that there are no laws of Oklahoma that require a party to an action to file a motion for new trial. A plaintiff to an action may act in good faith and persist in his conviction that he has proved his case against all defendants, but for any number of good reasons he may choose not to file an appeal if one defendant succeeds in convincing the court that a slight preponderance of evidence is in defendant's favor. One plausible reason in respondent's case could well have been to expedite the completion of the case and the receipt of a remedy for herself and her four minor children.

Petitioners do not cite one case, because they cannot do so, to the effect that because no motion for new trial was filed, following the verdict of the jury, that constituted an abandonment of respondent's cause of action, to justify removal at that time.

ARGUMENT

A. Summary

Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33), which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable", is a provision that is declaratory of the rule laid down by the decisions as they existed at the time of the passage of this amendment on May 24, 1949. (See Appendix, infra, p. 32). Under the rule laid down by the decisions then and now, petitioners' case was not removable. Therefore, the Supreme Court of the State of Oklahoma and the trial court correctly decided the case. However, petitioners have no standing to be heard on this point, because they had an ample opportunity to test their claim to a right of removal in the

United States District Court for the Western District of Oklahoma (R. 6). Petitioners voluntarily moved to dismiss their petition for removal (R. 34), which request was granted (R. 34). They have not filed a new petition for removal within the 20 days' limitation. Therefore, petitioners have waived whatever right they might have had in this respect and have no cause to complain to this Court. That disposes of petitioners' question 1 (Amended Pet., p. 2).

Petitioners have no standing to argue their question numbered 2 (Amended Pet., p. 3) because they did not argue it on appeal (R. 1-5) or in their petition for a rehearing (R. 44-46) before the State Supreme Court, which was denied (R. 46).

B. Amplification of Argument

1. First Question Presented

(a) The 1949 Amendment to 28 U.S.C. 1446 (b) Was Merely Declaratory of Existing Law, Except for the Time Limitation.

Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33) provides:

> "If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

This provision was added to Title 28, U.S.C. by the Act of May 24, 1949, through the enactment of H. R. 3762, 81st Congress (See 63 U.S. Stat., Vol. 63, Part I, 81st Cong. 1949, p. 89). This provision constituted the second paragraph of the amendment to subsection (b) of Section 1446 of Title 28 U.S.C., and it was contained in Section 83 of H. R. 3762, 81st Congress.

The Committee on the Judiciary of the House of Representatives of the United States reported to the House of Representatives House Report No. 352, March 30, 1949, to accompany H. R. 3762. In this report, Section 83 of H. R. 3762 is discussed and the following language, pertaining specifically to that part of Section 1446 (b) quoted above is found:

> "The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, Powers v. Chesapeake etc., Ry. Co., 169 U.S. 92)". See House Report No. 352, 81st Cong., 1st Sess., pp. 1 and 14; U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, pp. 1248, 1254 and 1268.

The only change in the law in that second paragraph was the 20 day limitation which is new and specific.

The first paragraph of Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) made a major change in the law of removal which is fully discussed in the House Committee Report on H. R. 3762 (See U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, page 1268).

The Committee on the Judiciary of the Senate of the United States reported to the Senate of the United States Senate Report No. 303, April 26, 1949, to accompany H. R. 3762. In that report we find this statement:

> "Section 83 of the bill as it passed the House makes a major change in the law concerning the removal of cases from State Courts to Federal Courts." (See Senate Report No. 303, 81st Congress, 1st Session, page 6; U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, pages 1253, 1254). However, the report then goes on to discuss exclusively in this connection the first paragraph of Section 1446 (b) of Title 28, U.S.C.

This first paragraph of Section 1446 (b) is not germane to this case except that the distinction made in the remarks in the Congressional Committee reports on this paragraph and the second paragraph of Section 1446 (b), which is germane to this case, indicates the clear Congressional intent to make a major change in the law of removal in the case of the first paragraph and to make the second paragraph merely "declaratory of the existing rule laid down by the decisions."

House Report No. 352, March 30, 1949, to accompany H. R. 3762, referring to what is the present last paragraph of Section 1446 (b) of Title 28 U.S.C., stated:

> "This is declaratory of the existing rule laid down by the decisions. (See for example, Powers v. Chesapeake etc., Ry. Co., 169 U.S. 92)."

This latter case involved a voluntary discontinuance on the part of the plaintiff in the State Trial Court after remand. After the case had been remanded, and when it was called for trial in the state court, the plaintiff discontinued his action against all the individual defendants, leaving it an action between citizens of different states; and the case then for the first time became one in its nature removable. The single remaining defendant thereupon immediately filed a second petition for removal, which was denied by the state court, but was granted and an amendment thereof allowed by the Circuit Court of the United States.

The Supreme Court of the United States affirmed the action of the Circuit Court of the United States after ruling:

> "It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States; and this petition was

rightly permitted to be amended in that court." John T. Powers v. Chesapeake and Ohio Ry. Co., 169 U.S. 92, 102.

The reason for the May, 1949 Amendment to Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) was to make clear that the Congress approved the rule as set out in the case of *John T. Powers* v. *Chesapeake and Ohio Ry. Co.*, 169 U.S. 92. In this case, the Supreme Court, as far back as 1898, in effect amended the removal statute by court rule to extend the time within which the defendant could file an application in the Federal Court to remove, to include, in addition to the answer day in the State Court, two additional exceptions (1) where a separate controversy existed and (2) where the plaintiff by his own action and voluntary conduct dismissed his cause of action as to the resident defendant before trial date, or during the trial. This May, 1949 Amendment (See Appendix, infra, p. 32) was adopted by Congress to include these two exceptions to the previous removal date as set out by statute, to include these two exceptions in the *Powers* case. At the time this May, 1949 Amendment (See Appendix infra, p. 32) was adopted, the rule of the *Powers* case was existing law.

It being established that the last paragraph of Section 1446 (b) of Title 28 U.S.C. (See Appendix, infra, p. 33) is merely declaratory of then and now existing law, there remains but to review the rule of the cases on removal.

(b) The Rule of the Cases in 1949 and Still Today.

The Supreme Court of the State of Oklahoma cited the leading pertinent cases on this point, as follows:

> "In their fifth proposition defendants urge that the trial court committed error when it refused to grant them a continuance in order to permit them to make application to the federal court to remove the case 'to that court after the demurrer to the evidence of the local defendant had [fols. 339-340] been sustained.

This question was determined adversely to the defendants' contention by the Supreme Court of the United States in Lathrop, Shea, & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 54 L. Ed. 177. See also Beaver Dam Cranberry Co. v. Pennsylvania Ry. Co., 125 N.J.L. 369, 15 A. 2d 613." (R. 43).

In the case of *Lathrop, Shea & Henwood Company* v. *Interior Construction & Improvement Company*, 215 U. S. 246, the action against the resident defendant was dismissed, leaving only the non-resident defendant, but plaintiff in good faith insisted on the joint liability of all the defendants until the close of the trial in the State Court. Defendant then removed the case to the Circuit Court of the United States.

The Supreme Court of the United States distinguished this case from the case of *John T. Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92. It reversed the decision of the Circuit Court of the United States and remanded, with directions to grant the motion of plaintiff to remand the case to the Supreme Court of the State. The Supreme Court of the United States quoted in support of its action the following language from the case of *Whitcomb* v. *Smithson*, 175 U. S. 635, 637:

"Passing on motions to dismiss or affirm and answering the contention of the receivers that they acquired the right of removal as though they were the sole defendants, when the court directed a verdict in favor of the railway company, this court said by the Chief Justice: 'This might have been so if when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company [the resident defendant], and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all of the defendants. Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-

liability of the railway company was ruled *in invitum.* . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them.'

The Whitcomb case and the Powers case are commented on and impliedly approved in Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 138. And again in Kansas City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 372. See also Alabama Great Southern Ry. v. Thompson, 200 U. S. 206.'' Lathrop, Shea & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 250, 251.

The cases cited by the Supreme Court of the State of Oklahoma (R. 43) are authority for the proposition, and they have not been overruled in any later cases, that when a local defendant is dismissed against the contention of the plaintiff, this does not then make the case removable by the non-resident defendant. To the same effect are *Kansas City Suburban Belt Railway Company* v. *Andrew Herman,* 47 L. Ed. 76, 79; *Whitcomb* v. *Smithson,* 175 U. S. 635, 638; *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239.

Cudney v. *Midcontinent Airlines, Inc.,* 98 F. Supp. 403, decided June 13, 1951, was decided after Section 1446 (b) of Title 28, U.S.C., was amended on May 24, 1949. The Federal District Court applied the traditional rule:

> ''The general rule is that right of removal will be decided by the pleadings. See cases 28 U.S.C.A. Sec. 1441, page 206. If the complaint charged only a claim against a non-resident defendant we think the non-resident defendant had two courses open—either to move for a more definite charge as to acts of the resident defendant upon which liability was claimed, or to stand on the pleadings and its position that no claim was stated against the resident defendant and remove

within twenty days and try the issue presented by the pleadings before this Court. See subparagraph (b) Section 1446, Title 28 U.S.C.A. The defendant did neither.

By going to trial in the State Court and awaiting a chance to move for dismissal as to the resident defendant on the merits of the case, as made by plaintiff's proof, and being successful on the motion, over plaintiff's protest, the non-resident defendant did not thereby acquire a right of removal. American Car & Foundry Company v. Kettelhake, 236 U. S. 311, 35 S. Ct. 355, 59 L. Ed. 594; Lathrop, Shea & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 30 S. Ct. 76, 54 L. Ed. 177; Henley v. Community Natural Gas Co., D. C. N. D. Tex. 24 F. 2d 252; Kincheloe v. Hopkins, D. C. N. D. Okl. 4 F. Supp. 196." Cudney v. Midcontinent Airlines, Inc., 98 F. Supp. 403, 405.

(c) Petitioners' Cases Are In Accord With Respondent's Contentions.

In fact, the cases cited in support of petitioners' Section 1 of Reasons for Granting the Writ (Amended Pet., 6) do not establish the existence of a contrary rule.

Bradley v. *Halliburton Oil Well Cementing Co.* (E.D. Okl., Sept. 27, 1951), 100 F. Supp. 913, is cited by petitioners. In this case the resident defendant had died, after the case was filed and before it came on for trial. The court held that where the resident defendant died after suit was filed and before the cause of action is revived against the resident defendant by administration proceedings and the joinder of the administrator, the case was properly remanded to the Federal Court. It comes under the same exception.

To make this case analogous, the defendant in the trial court, Prather, would have had to die before trial date and the case removed to the Federal Court, before the case was revived against Prather's administrator. The case is not in point. To the extent that it may be read to imply

that the 1949 Amendment to Title 28, U.S.C. made a fundamental change in the second paragraph of Section 1446 (b) (See infra, p. 33), it is not in accord with the House Report on H. R. 3762, as explained supra, p. 13.

Another case cited by petitioners, *Waldron* v. *Skelly Oil Co.* (E. D. Mo., Nov. 26, 1951), 101 F. Supp. 425, supports respondent's position. Action was commenced against two resident corporations and a non-resident corporation. The action was voluntarily dismissed as to the two resident corporations by the plaintiff. Of course, the action against the non-resident thereupon became one which was removable to the Federal Court. That was the law before the May, 1949 Amendment to Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) and still is the law, as contended by respondent. The Court further held that the defendant later waived his right to remove by continuing in the State Court.

Petitioners cite another case, *Hamilton* v. *Hayes Freight Lines, Inc.* (E. D. Ky., Feb. 13, 1952), 102 F. Supp. 594, which does not take issue with respondent's contention that the May, 1949 Amendment to the second paragraph of Section 1446 (b) of Title 28 (See Appendix, infra, p. 33) was merely declaratory of existing law. That case simply holds that the defendant must file his removal within the 20 days provided in the statute.

Respondent agrees that the purpose of the 1949 Amendment to Section 1446 (b) of Title 28 U.S.C. was to make clear that removal could be made within 20 days where removability—though not ascertainable from the initial pleading—becomes ascertainable thereafter. However, whether it becomes ascertainable thereafter is to be determined by the existing rule laid down by the decisions, as that rule existed on May 24, 1949, when the Amendment (See Appendix, infra, p. 33) was adopted. The removability of the case is determined by "the existing rule laid down by the decisions" as of May 24, 1949, except for the 20 day time limitation which is new and specific.

Petitioners state that the Supreme Court of Oklahoma expressly held with respect to the 1949 Amendment to Section 1446 (b) (See Appendix, infra, p. 33):

> "We do not think this change was intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial. (R. 44)." (Amended Pet., 7).

However, the Supreme Court of Oklahoma, prior to making that remark, correctly stated the pertinent law and cited the ruling cases on the issues, showing that the court understood that the 1949 Amendment to the second paragraph of Section 1446 (b) of Title 28 U.S.C. (See Appendix, infra, p. 33) was merely declaratory of existing law. The cases which it cited pertained to cases in various stages of trial. (R. 43).

If the language of the State Supreme Court is too sweeping in this respect, because a few exceptions not relevant to petitioners' case existed which affected a case in the process of being tried, as explained above, this would still not call for a reversal in the absence of proof that petitioners' case fits within one of those exceptions in the rule laid down by the cases in existence in May, 1949, and such proof has not been and cannot be made.

(d) Waiver of Petitioners' Right to Challenge Trial Court Decision.

Finally, while the above considerations would be determinative of the first question raised by petitioners' as rephrased by respondent to fit the facts of this case (See supra, pp. 2 & 3), if petitioners were in a position to raise it, the fact is that petitioners have waived their right to challenge the decision of the District Court of Oklahoma County, State of Oklahoma rendered against them. That State Court rendered a verdict and judgment in favor of respondent (R. 32) on June 21, 1949. Petitioners filed their motion for a new trial on June 24, 1949 (R. 29). On

June 27, 1949, within six days after trial and within three days after petitioners filed their motion for a new trial, and while this motion was pending, petitioners filed in the United States District Court for the Western District of Oklahoma, a petition for removal (R. 6), purporting to base this petition upon 28 U.S.C., Sec. 1446, as amended on May 24, 1949 (See Appendix, infra, p. 32). Petitioners filed in the State Court on June 27, 1949, the certificate of the clerk of the United States District Court for the Western District of Oklahoma showing receipt of the petition for removal (R. 6).

In that petition for removal, petitioners argued that respondent had voluntarily discontinued her action against the resident defendant and had voluntarily failed to file a motion for a new trial as against the resident defendant, Prather, during the trial held on June 20 and 21, 1949 (R. 8). (For a refutation of this argument see supra, pp. 7-12). Petitioners argued further for removal to the Federal District Court, as follows:

> "Whereupon said cause did for the first time become removable and in compliance therewith your petitioners have caused this petition to be filed." (R. 8, 9).

Petitioners voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34). The United States District Court for the Western District of Oklahoma granted petitioners' request and ordered the cause dismissed without prejudice and at the costs of petitioners on July 22, 1949 (R. 34).

On July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County, State of Oklahoma, which motion was overruled (R. 31). The Court thereafter entered final judgment (R. 31). Petitioners appealed to the Supreme Court of Oklahoma (R. 1). The Supreme Court affirmed the judg-

ment of the trial court (R. 44). A petition for rehearing filed on March 3, 1952 (R. 44) was denied on March 25, 1952 (R. 46). Application for leave to file a second petition for rehearing filed on March 29, 1952 (R. 46) was denied on December 16, 1952 (R. 51).

Petitioners argue that their "cause did for the first time become removable" on or about June 20 and 21, 1949 (R. 8, 9). According to petitioners' own arguments, the Federal Court had exclusive jurisdiction to grant them a remedy (Amended Pet., 8, 9). Petitioners in the Appendix to their amended petition (R. 12) cite 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) which states that a petition for removal under the circumstances of petitioners' case may be filed within 20 days. Petitioners filed within the 20 days, but then dismissed their petition voluntarily and have not filed their petition anew in the Federal Court since that time. The twenty days having elapsed, petitioners waived, abandoned, or lost their only opportunity under the statute to assert whatever right they might have had in this regard.

As stated by the Supreme Court of the United States in the case of *Northern Pacific Railroad Company* v. *Austin*, 135 U. S. 315, 318:

> "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. Spies v. Illinois, 123 U. S. 131; Chappell v. Bradshaw, 128 U. S. 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the District Court, nor by the Supreme Court in affirming the judgment."

2. Second Question Presented

(a) The Record Fails To Show That the Trial Court Proceeded Irregularly.

Petitioners state as section 2 of their reasons for granting the writ:

> "The revision of the Code in 1948, and the Amendments of 1949, abolished this prior practice. A new procedure was established which provided that once a proper petition for removal was timely filed in the appropriate federal court, the removal was effected and the state court could proceed 'no further unless and until the case is remanded.' 28 U.S.C., Section 1446 (e). The remand was acomplished when 'a certified copy of the order of remand shall be mailed by [the federal court] clerk to the clerk of the state court. The state court may thereupon proceed with [the case].' 28 U.S.C., Section 1447 (c).
>
> In the instant case a petition for removal was filed prior to the trial court's ruling on the motion for a new trial. Petitioners conformed in all respects to the requirements of the removal statutes and filed the necessary certification with the clerk of the state court reflecting that the petition for removal had been filed in the federal court. The state court, nevertheless, continued with the case in the face of the clear language of the removal statutes. Accordingly, if the removal statutes mean what they say, the trial court, in going forward with the case without having an order of remand or a notice of the withdrawal of the petition for removal, proceeded without jurisdiction and all proceedings thereafter were void and of no effect." (Amended Pet., 8, 9).

This statement falls far short of being a candid one. It is rather a candied one. Petitioners do not state that the District Court of Oklahoma County rendered a verdict and judgment against petitioners on June 21, 1949 (R. 32); that petitioners filed their motion for a new trial on June 24, 1949 (R. 29); that on June 27, 1949, while petitioners'

motion for a new trial was still pending, petitioners filed in the Federal District Court a petition for removal (R. 6); that petitioners filed in the state court on June 27, 1949, the certificate of the clerk of the Federal District Court (R. 6); that petitioners voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34); that the Federal Court granted petitioners' request and ordered the cause dismissed without prejudice on July 22, 1949 (R. 34); that on July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County. This places the whole matter in a revealing, new light.

Respondent objects to the consideration of petitioners' statement that "the trial court, in going forward with the case without having received an order of remand or a notice of the withdrawal of the petition for removal, proceeded without jurisdiction and all proceedings thereafter were void and of no effect." (R. 9).

Respondent objects to the consideration of petitioners' question 2, implying that the court in this case proceeded "further with the case when it has not received a certified copy of the order of remand from the clerk of the federal court." (R. 3).

Respondent objects to the consideration of petitioners' statement that "the District Court of Oklahoma County, without having received a certified copy of any order of remand or, indeed, a certified copy of the order dismissing the petition for removal from the clerk of the federal court, continued with the proceedings in contravention of Sections 1446 (e) and 1447 (c) of Title 28 U.S.C." (Amended Pet., 5, 6).

As far as the record of this court is concerned, these are absolutely gratuitous assumptions. The record shows there were no proceedings in the state court during the time the petitioners' petition for removal was pending in the federal court, namely between June 27, 1949, the date of

filing, and July 26, 1949, the date of order of dismissal. Furthermore, there is no claim made by petitioners that the Federal District Court Clerk had not mailed the certified copy of the order to the Clerk of the State Court. If that was done, then the State Court could proceed under 28 U.S.C. 1447 (c), (Appendix, infra, p. 34).

(b) Petitioners Failed to Assert This Claim in Their Appeal to the Supreme Court of the State or in Their Petition for a Rehearing.

Although petitioners appealed to the Supreme Court of Oklahoma (R. 1), there is not any reference in that appeal to the absence of a certificate in the state trial court (R. 1-5), and petitioners failed to assert that right on appeal. They also failed to assert that right in their Petition for Rehearing in the Supreme Court of Oklahoma (R. 44-46), which was denied (R. 46). The suggestion of the absence of such a certificate seems to come as an afterthought in petitioners' Application for Leave to File Second Petition for Rehearing (R. 47), which was denied (R. 51). Petitioners' failure to argue this point on appeal and in their petition for rehearing constituted reason enough for denying their claim in their Application for Leave to File Second Petition for Rehearing. Of course, this claim in petitioners' Application for Leave to File Second Petition for Rehearing is not valid evidence of the absence of such a certificate on file in the trial court at the time it considered petitioners' motion for a new trial. Accordingly, petitioners' arguments on their question 2 (R. 3) and petitioners' question 2 (R. 3) should not be considered by this court.

(c) Even if Petitioners Could Now Assert This Claim, the Rule of the Cases is Against Their Contentions.

Even if petitioners could assert this claim, it would be ruled out by the holding of this Court in the case of *Northern Pacific Railroad Company* v. *Austin*, 135 U.S. 315, 318, to the effect that:

> "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Spies* v. *Illinois*, 123 U.S. 131; *Chappell* v. *Bradshaw*, 128 U.S. 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the District Court, nor by the Supreme Court in affirming the judgment."

Section 1447 (c) of Title 28 U.S.C. (See Appendix, infra, p. 34) imposes upon the clerk of the District Court the duty of mailing to the clerk of the State Court a certified copy of the order of remand. It is axiomatic that, in the absence of proof that this was not done, it will be presumed that federal officials and state officials have performed their duty.

Furthermore, if petitioners had been able to assert this claim in this Court, they would have been placed in the awkward position of seeking a favorable answer to their question 2 (Amended Pet. 3), as rephrased to fit the facts of this case. This question would be:

May an unsuccessful defendant in a state court who has petitioned a federal district court for removal, arguing that his cause did for the first time become removable during the course of the trial, and who then has voluntarily dismissed his petition for removal, four days after this voluntary dismissal argue his own motion for a new trial in the state trial court and present no objection to said proceeding in the trial court and not call the attention of the trial court to the existence of the dismissal, and upon losing out in the trial court later bring an appeal, and after that a petition for rehearing to the Supreme Court of the State, and not mention the fact of the absence of a certified copy of the order of remand in the trial court until he files an Application for Leave to File Second Petition for Rehearing,

which he is denied and then complain successfully to this Court?

The question would then be raised as to whether he is in a position to complain when he, knowing of the dismissal of his petition for removal, never brought the fact of the absence of a certified copy of the order of dismissal to the attention of the trial court and induced the trial court to believe the petition was dismissed and everything was in order, because he is arguing his own motion for a new trial. Could he complain of his own wrongdoing or negligence? Could he thus remain silent and be placed in the enviable position of taking advantage of his silence if the decision were in his favor, but objecting, as petitioner did in this case, if the decision went against him?

These questions are pregnant with a monumental no. A search of the cases has failed to yield an answer to these questions as no pleader has been apparently so audacious in the past.

Furthermore, what could this Court do or the lower courts have done for petitioners except to allow them to go to the Federal Court, which privilege they exercised and then voluntarily abandoned?

In their Statement, petitioners made the following erroneous remarks:

> "At the trial respondent abandoned the alleged acts of negligence against Prather and confined her evidence to the condition of the stairway. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them." (R. 4)

These baseless charges have been refuted in respondent's statement (See infra, pp. 7-12).

If this Court, or the lower courts had heeded petitioners' pleas, they would simply have allowed them to do what they chose not to do, to present the question of a theoretical fraudulent joinder to a federal court. They did this early in the proceedings (R. 13) and the federal court sustained respondent's motion to remand (R. 15-16).

In this the Federal Court was backed by a solid wall of decisions to the effect that the non-resident defendant seeking removal of a case to the federal court has the burden of proving that the resident defendant was fraudulently joined to prevent removal. All the authorities hold that the alleged fraud of plaintiff in joining the resident defendant to prevent removal to the federal court must be proven by clear and convincing evidence. *Davis* v. *Standard Oil Co. of Indiana et al,* 47 Fed. 2d 48; *Smith* v. *Southern Pac. Co. et al,* 187 Fed. 2d 397; *Trivette* v. *Chesapeake & Ohio Ry. Co. et al,* 212 Fed. 641.

If petitioners had remained in the Federal Court, they would have had an opportunity to present the simple question of whether the trial court erred in denying petitioners' motion to stay the proceedings in the trial court in order that petitioners might file a petition for removal to a Federal Court. They would have had to prove that grounds for removal appeared. They could not have succeeded in view of the decisions discussed, supra.

For instance, in *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239, there was an action in a state court brought by a citizen and resident of the state. A non-suit was granted at the close of plaintiff's preliminary case as to the resident defendants without plaintiff's consent. The plaintiff even refrained from opposing the motion for a non-suit, although he did not consent to it. The court stated:

> "Upon the facts, the case is not to be distinguished from that of *Whitcomb* v. *Smithson,* 175 U.S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, held not to be a removable cause.
>
> The facts do not bring the case within the principles of *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U.S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. They do not disclose, as in that case, a voluntary discontinuance by the plaintiff as to the resident defendants. The fact that plaintiff refrained from opposing the motion for non-suit is not the equivalent of a voluntary dismissal by him as to the two defendants submitting the motion, since it may well be that previous rulings of the court during

the trial had made it impossible for plaintiff to make out a case as against those defendants. At to this, of course, the record here is silent. But, however, that may be, the record does disclose that plaintiff refused his consent that the two defendants be dismissed from the case, and, this being so, he cannot be regarded as voluntarily abandoning the right to have the case proceed upon the theory upon which it was begun. As said in Whitcomb v. Smithson with reference to the order granting the non-suit in that case:

> 'This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other dedendants to prevent the plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developing on the merits of the issues tried.' '' *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239, 240.

In view of the uniformity of the decisions upon the issue of removability at the time of the enactment of Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33), it is no wonder that petitioners voluntarily dismissed their petition for removal in the Federal Court (R. 34).

CONCLUSION

The decision is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

TITLE 28 U. S. C.

Section 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1446. Procedure for removal (as amended May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the Clerk of such State court.

Section 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.

Section 1446. Procedure for removal (as enacted June 25, 1948 but prior to amendment on May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Upon the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further therein unless the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.